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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 677

THE UNITED STATES OF AMERICA ON RELATION OF Lucien H. Greathouse and Rebekah S. Greathouse, petitioners

v.

GEORGE H. DERN, AS SECRETARY OF WAR, AND LYTLE Brown, as Chief of Engineers

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals of the District of Columbia (R. 63–72) is reported in 63 F. (2d) 137. The opinion of the Supreme Court of the District of Columbia (R. 19–34) is not reported.

JURISDICTION

The judgment below was entered January 16, 1933 (R. 83). The petition for a writ of certiorari was filed February 9, 1933, and was granted March

13, 1933. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether proceedings by mandamus are appropriate to direct action of an executive officer of the Federal Government, where

   (*a*) The statute under which relators claim imposes no duty upon the officer;

   (*b*) A bona fide dispute concerning rights in land is involved, and would have to be decided in determining whether mandamus should issue.

2. Whether relators have any rights sufficient to justify their encroaching upon lands owned by the United States.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, p. 45.

STATEMENT

This proceeding was instituted by a petition for a writ of mandamus to compel the Secretary of War to issue a permit to the Sun Oil Company, a corporation, for the construction of a wharf in the Potomac River on the Virginia shore (R. 2–9). The facts may be summarized as follows:

Petitioners since April 29, 1930, have been the owners in fee simple of certain described lands situated above high-water mark upon the Virginia

shore of the Potomac River and alleged to be adjacent to the navigable waters thereof (R. 2–4, 6). On June 24, 1929, their predecessor in title contracted to sell the property to the Sun Oil Company, the sale being contingent upon the granting of permission to erect tanks and other equipment on the land and to construct wharves, piers, and moorings out from and in front of the property into the Potomac River (R. 40–41).

The agreement between the Sun Oil Company and petitioners' predecessor was to expire on December 31, 1929, but in November of that year it was extended to April 5, 1930 (R. 41). On May 9, 1930, the petitioners and the Sun Oil Company entered into an agreement which repeated the terms of the original contract and which extended the expiration date to August 1, 1930 (R. 41, 6). On that date the contract was extended by agreement to April 30, 1933, conditioned upon the granting prior to that date of such permits as are legally necessary for the construction of wharves and other structures in the Potomac River; provision was made for a renewal of the contract for a three-year term following April 30, 1933, in the event that the permits should not have been obtained before that date and it was agreed that petitioners would "continue their efforts and make every further reasonable endeavor to deliver or cause to be approved * * * permission to construct a wharf in the Potomac River opposite the land owned by parties of the first part by prosecuting to

the courts of last resort, if necessary, their right to said permit or permission. Parties of the first part shall have all benefits and inchoate rights resulting from the efforts of party of the second part to obtain permits" (R. 41–42).

On October 24, 1929, the Sun Oil Company made application in its own name to the Chief of Engineers for permission to construct a wharf into the Potomac River "approximately 400 yards above the Key Bridge at Rosslyn, Virginia" (R. 6, 47). The application stated that the company owned the land in front of which the wharf was to be built (R. 47).

This application was considered by the respondent Brown, Chief of Engineers, who found that the proposed structure would not obstruct navigation in the Potomac River and recommended to the Secretary of War that the permit be granted (R. 7, 45–47). On August 15, 1930, the Secretary of War denied the application and refused to issue the permit (R. 7, 10–11).

Upon these facts, petitioners brought suit for mandamus in the Supreme Court of the District of Columbia to compel the Secretary of War to issue the permit to the Sun Oil Company for the construction of the wharf. It was alleged that under Section 10 of the Rivers and Harbors Appropriation Act of 1899, the Secretary of War could refuse permits only when the proposed structure would be an obstruction to navigation. It was alleged that the Secretary of War had refused to authorize the wharf now in question not on the

ground that it obstructed navigation, but upon considerations involving the development of public parks and other matters having no relation to navigation. (R. 5–7.) The action of the Secretary was asserted to be unreasonable and arbitrary and a deprivation of the petitioners' rights as riparian owners to erect wharves (R. 7–8). The petition concluded with the prayer that the court should adjudge the petitioners to be entitled to approval of their application, and that it should issue its writ of mandamus commanding the Secretary and the Chief of Engineers to authorize the construction in the Potomac River (R. 8–9).

In response to a rule to show cause, the respondent Brown admitted that the application for construction of a wharf had been filed with him by the Sun Oil Company, but stated that he had recommended the approval of the plans as set forth in the petition and that he had "done all that the law requires him to do, and is without power to do anything further" (R. 12).

The respondent Secretary of War[1] answered the rule to show cause and admitted that the Chief of Engineers had considered the plans attached to the application for a permit to build the wharf and had found that the wharf as planned would not obstruct navigation in the waters of the Potomac River (R.

[1] This proceeding was instituted against Patrick J. Hurley, as Secretary of War. On March 27, 1933, upon motion made to this Court, George H. Dern, as Secretary of War, was substituted as respondent in place of Patrick J. Hurley.

14). He denied, however, that his refusal to authorize the construction was not based upon the ground of obstruction to navigation but was based upon considerations involving the development of public parks and other matters having no relation to navigation. He further averred that the petitioners were without riparian rights that could be destroyed by his refusal to authorize the construction of the wharf (R. 15), and alleged that the petition did not show that the relators were entitled to the performance of any duty on the part of the Secretary of War (R. 16). The respondent stated also that he had acted within the discretion vested in him by Section 10 of the Act of 1899 (R. 16).

The respondent also alleged "that to have authorized the construction of the wharf by the Sun Oil Company would have been to cause the erection of a structure inimical to the proposed improvements as contemplated and authorized by the Act approved May 29, 1930, * * * entitled 'An Act for the acquisition, establishment, and development of the George Washington Memorial Parkway along the Potomac from Mount Vernon and Fort Washington to the Great Falls, and to provide for the acquisition of lands in the District of Columbia and the State of Maryland and Virginia requisite to the comprehensive park, parkway, and playground system of the National Capital,' and that the authorization for the erec-

tion of such structure would be against a public policy of the United States" (R. 16).

It was further answered that the relators had not made application to either of the respondents for permission to erect a wharf and that, therefore, no right had been denied them by the refusal to authorize the Sun Oil Company to construct a wharf in the waters of the Potomac River (R. 16–17). Respondent also stated that—

> he is informed and believes and therefore avers that the United States is the owner in fee of the south bank of the Potomac River within the limits of the District of Columbia to the high water mark of 1792 of the Potomac River (R. 17).

Upon these answers issue was joined (R. 19). At the opening of the case counsel for respondents admitted that the construction of the wharf involved in this case would not obstruct navigation and that the decision of the Secretary of War declining to authorize the construction was not by reason of any matter connected with navigation—

> but that the only thing that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway (R. 38–39).

It appears that prior to the date of trial, the National Capital Park and Planning Commission had

resolved to take possession of certain property alleged to belong to the United States.[2] This property extended from the high-water mark of 1863 on the south shore of the Potomac River to the thread of the stream (R. 51–53). A part of this property, being the area between the high-water marks of 1863 and 1931, is included in the land upon which the projected wharf would be built. This land was staked out, copies of the resolution were ordered to be placed on the stakes within the area prescribed, and a description of the area had, prior to the hearing of this case, been sent to the Attorney General for the purpose of having suits filed under the Act of April 27, 1912, c. 96, 37 Stat. 93. (R. 51–53, 56–57.)

The Supreme Court of the District of Columbia dismissed the petition and discharged the rule to show cause (R. 35). The Court of Appeals of the District of Columbia affirmed the judgment of the Supreme Court of the District (R. 83).

SUMMARY OF ARGUMENT

I

Mandamus is not a proper remedy in this case. Section 10 of the Rivers and Harbors Appropria-

[2] This resolution was passed under the authority of the so-called Crampton Act, c. 354, Sec. 1 (a), 46 Stat. 482, 483: "* * * The National Capital Park and Planning Commission is authorized to occupy such land belonging to the United States as may be necessary for the development and protection of said parkway * * *."

tions Act of 1899 (*infra*, p. 45), upon which the relators rely, commands no action of the Secretary of War. The section does not contain a direction to him but is prohibitory in its form and intent. Moreover, the statute requires interpretation by the Secretary in order to establish the scope of his function. The construction adopted by the Secretary is not an arbitrary one and should not be reviewed in mandamus.

Wholly apart from consideration of the particular statute here involved, the relators are not entitled to relief by mandamus. They are not seeking to construct a wharf for themselves or to obtain a permit to do so. They are seeking to use this extraordinary legal remedy in behalf of another in order to advance their own indirect, conditional, and prospective advantage.

The merits of the controversy between the Secretary of War and the relators turn in large degree upon the title to lands both on the shore of the Potomac River and under the waters of the river. Determination of the question whether the permit, even if ordered, would be effective, depends in large measure upon deciding the title to real property, as to which there is a real and substantial dispute. Mandamus therefore cannot be considered an appropriate procedure for deciding the rights of the parties.

II

The relators have no rights in the land under the Potomac River sufficient to enable them to build a wharf. The refusal of the Secretary of War to issue to them a permit therefore did not deprive them of any rights to which they were entitled.

The relators have no title to any land below high-water mark in the Potomac River. This follows from the decisions of this Court in *Morris* v. *United States,* 174 U.S. 196, 225, and *Smoot Sand & Gravel Corp.* v. *Washington Airport,* 283 U.S. 348. The original grant of the relators' land carried with it no rights to build a wharf into the river. *Shively* v. *Bowlby,* 152 U.S. 1, 13. The relators, therefore, cannot establish a right to build wharves into the river by reliance upon the grant to their ultimate predecessor in title.

No right to erect wharves in the Potomac River has been acquired either by prescription or usage. Relators do not allege that there is a pier in front of their property or that there ever has been one. If they have a prescriptive right, then, it must be based on long continued usage general to the Virginia shore of the Potomac River.

Maryland decisions with respect to the period prior to the creation of the District of Columbia plainly establish that no right in the riparian owner to build a wharf in navigable streams was recognized in the absence of legislation specifically au-

thorizing such a structure. After 1791 the question was one of the law of the District of Columbia. The relators point to no decision, statute or usage in the District of Columbia which indicates in any way that the law has been changed. It is, of course, obvious that the relators' position cannot be aided by any legislation or usage of the Commonwealth of Virginia.

The relators place their chief reliance upon the Compact of 1785 between the States of Maryland and Virginia. This Court has specifically decided that the Compact granted no private rights beyond the control of the contracting States, and thus beyond the control of the United States as successor to Maryland. *Georgetown* v. *Alexandria Canal Co.*, 12 Peters 91. The courts of the District of Columbia have repeatedly held that the Compact has never been in force in the District. These decisions establish a local rule of property in the District which should be conclusive in this case.

Even if the Compact of 1785 remained in force after the retrocession to Virginia, it can stand no higher than a statutory right of wharfage accorded to a riparian proprietor on a navigable stream. Such a right, both under the decisions of this Court and in Maryland, is a mere license revocable at the pleasure of the legislature until acted upon.

The decisions of this Court in *Shively* v. *Bowlby*, 152 U.S. 1, and in *Marine Railway Co.* v. *United*

States, 257 U.S. 47, establish the absence of the rights which the relators claim.

ARGUMENT

I

MANDAMUS IS NOT A PROPER REMEDY IN THIS CASE

A. The statute imposes no duty on the Secretary of War

The present case is not one in which the writ of mandamus should issue to compel the Secretary of War to act. That remedy is appropriate to compel an officer to act only when the statute under which he is called upon to perform his function imposes a clear duty upon him; the mandate of the statute must be positive, the duty to be performed must be purely ministerial, the obligation to act must be explicit and clearly defined. The law must not only authorize action, but require it. See *United States ex rel. McLennan* v. *Wilbur,* 283 U.S. 414; *International Contracting Co.* v. *Lamont,* 155 U.S. 303, 308.

Section 10 of the Rivers and Harbors Appropriations Act of 1899 (*infra,* p. 45) authorizes but does not require action of the Secretary of War. The section contains no direction to him. It prohibits the building of structures in navigable rivers without his authority. The section provides:

> That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and

> it shall not be lawful to build or commence the building of any wharf * * * or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of War * * *.

No duty to act is imposed. If the Secretary, for any reason, fails to authorize the proposed structure, the unsuccessful applicant may not proceed with his plans. Even so the courts may not direct the Secretary to approve that which he has declined to approve, and the applicant's remedy is with Congress.

This Court in *Sanitary District of Chicago* v. *United States,* 266 U.S. 405, considered the consequences of the Secretary's refusal under this section to permit a certain diversion of water. It was there held that the Secretary's action invaded no rights of the applicant and that he had merely refused an application "to remove a prohibition that Congress imposed." The Court suggested (p. 431) that argument calculated to show that great loss was threatened by the Secretary's refusal to approve the increased diversion should be addressed to Congress "to induce a modification of the law that now forbids that increase unless approved as prescribed."

This was the plain purpose of the statute—to prohibit all structures in navigable rivers of the

United States unless authorized by the Secretary of War. The power to approve, conferred by the statute, implies the power to withhold approval, and the duty is plainly not ministerial. There is no statutory direction that any structure be approved and the discretion of the Secretary in withholding approval may not be controlled by mandamus. *Apfel* v. *Mellon*, 33 F. (2d) 805 (App.D.C.), certiorari denied, 280 U.S. 585.

Moreover, we submit, the statute involved in the present case requires interpretation by the Secretary in order to establish the scope of his function and the limits of proper action by him upon applications for building in navigable waters. Here, the Secretary, as appears from his answer to the rule to show cause, construed Section 10 as conferring discretion to withhold approval of wharf plans whenever he deemed the erection of the structure inimical to the interests and public policy of the United States. In this case invasion of the property and interference with plans of the Federal Government as declared by statute were deemed an appropriate ground for refusal of the requested authorization. (R. 16.) Neither the construction of the statute, nor the Secretary's exercise of discretion was arbitrary or capricious.[3] Where the statute under

[3] The legislative history of the Act of 1899 sheds no light on the purposes of Section 10. Section 9 of that Act requires, however, that Congress assent to the building of bridges, dams, and other like structures, while Section 10 repeated that no obstruction to the navigable capacity

which an officer is authorized to act is open to construction by him, mandamus will not lie to control his action based upon a tenable interpretation of the statute. See *Ness* v. *Fisher*, 223 U.S. 683; see also *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218. It is not necessary that his construction

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of waters of the United States could be constructed without the affirmative authorization of Congress. As to other structures in navigable waters and as to alterations in the course or capacity of navigable waters consent of Congress is not required if the approval of the Secretary of War has been secured. The apparent distinction thus made between obstructions of the navigable capacity of waters, and wharves and other like structures, suggests that the Secretary might properly refuse a permit for building the latter upon considerations other than their effect upon navigability and even though separately considered they might be innocuous. Thus, it has been held that the Secretary may forbid an alteration in the capacity of navigable waters which was in fact harmless, upon the ground that a number of such alterations might have a harmful cumulative effect. See *Gleason Coal Co.* v. *United States*, 30 F. (2d) 22 (C.C.A. 6th). Cf. *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251, 263, 267–268. Petitioners suggest that the Secretary's power under Section 10 is limited to a determination of what in a particular case would constitute an unreasonable obstruction of navigation (see *Wisconsin* v. *Illinois*, 278 U.S. 367, 413), and rely upon an opinion of the Attorney General (27 Op.A.G. 284) advising that injury to adjacent private property should not be considered in determining whether construction of a dolphin should be permitted in navigable waters. There, however, unlike the present case, the prospective injury would have fallen on property in which the United States had no interest and which it was not called upon to protect. Likewise, in *New York ex rel. Spreager* v. *Department of Health*, 226 N.Y. 209, the contemplated damage to surrounding property was not damage to property belonging to the City of New York.

be one which would be approved upon judicial review, so long as it may be regarded as a possible construction of the Act. See *Work* v. *Rives*, 267 U.S. 175, 183; *Hall* v. *Payne*, 254 U.S. 343; *United States ex rel. Endicott* v. *Mellon*, 39 F. (2d) 505 (App.D.C.), certiorari denied, 282 U.S. 849.

The fact that no provision is made to review the judgment of the Secretary does not militate against our contention that mandamus may not be awarded in cases like the present. See *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 325; *In re Rice*, 155 U.S. 396, 403. Cf. *United States* v. *Babcock*, 250 U.S. 328, 331.

B. Mandamus will not issue where the Secretary's duty turns on a disputed question of title to land

The merits of the controversy between the Secretary of War and petitioners turn in large degree upon the title to lands, and title to property will not be tried in mandamus proceedings.

The Secretary of War alleged in his answer to the petition for a writ of mandamus "that the United States is the owner in fee of the south bank of the Potomac River within the limits of the District of Columbia to the high water mark of 1792." Unless the land bordering on the river was formed by accretion it belonged to the United States and not to the relators. Whether the land bordering on the river at the *locus in quo* was formed by accretion was a question of fact. The answer to the

question of ownership of this strip of land was a complicated one, requiring recourse to geological data and other evidence. Preliminary steps have been taken by the Government to bring to a judicial determination the Government's title to this disputed area (R. 51–53; 56–57). In the meantime, the title to a part of the petitioner's land is clouded, and where a substantial doubt exists in relation to title, mandamus will not lie. Cf. *Bayard* v. *United States ex rel. White,* 127 U.S. 246; *Ex parte Hughes,* 114 U.S. 147. See also *Ex parte Hussein Lutfi Bey,* 256 U.S. 616, 619; *Ex parte Chicago, R. I. & P. Ry. Co.,* 255 U.S. 273, 275; *Ex parte Muir,* 254 U.S. 522.

In *United States ex rel. Redfield* v. *Windom,* 137 U.S. 636, the relator sought to compel the Secretary of the Treasury to prepare and issue a draft to the relator in payment of a duly audited and approved account. The duty to deliver the draft was clear, but the Secretary withheld it. In response to a rule to show cause, he pleaded a special agreement with the relator, by which he was authorized to retain the draft until the relator had performed certain conditions, which it was alleged he had failed to fulfill. This Court said (p. 646) that the answer raised disputed questions of law and fact, which should not be tried in a mandamus proceeding; this circumstance alone was regarded as sufficient cause for discharge of the rule and refusal to issue the writ. Similarly, in the present case, the dispute as to the title of the property in ques-

tion raises controverted matters justifying denial of the relief sought by the relators.

There is a like controversy between the relators and the United States as to the ownership of lands under the waters of the Potomac River. We contend that full and exclusive title to these lands is vested in the United States, as we shall show more particularly in Point II of our brief. If, as we believe, the United States was the proprietor of the lands upon which the proposed wharf was to be built, either those lands bordering the waters or those beneath them, the structure which petitioners contend should be authorized would constitute an encroachment which they had no privilege to build upon the lands of another. Since determination of the question whether the permit, even if ordered, would be effective, depends in large measure upon deciding the title to real property, as to which there is a real and substantial dispute, mandamus cannot be considered an appropriate procedure for adjudicating the rights of the parties. Cf. *Turner* v. *Fisher*, 222 U.S. 204.

II

THE RELATORS HAVE NO RIGHTS IN THE LAND UNDER THE POTOMAC RIVER SUFFICIENT TO ENABLE THEM TO BUILD A WHARF; THE REFUSAL OF THE SECRETARY OF WAR TO ISSUE TO THEM A PERMIT THEREFORE DID NOT DEPRIVE THEM OF ANY RIGHTS TO WHICH THEY WERE ENTITLED

Even though it be held that the authority of the Secretary of War under the Act of March 3, 1899, *supra*, is limited to the question whether a proposed structure will interfere with navigation, the re-

lators are not entitled to the permit they seek if it appears that they have no authority to build the wharf in question. If the relators have no such right, they would not be able to build the wharf even if the permit were granted (*Attorney General* v. *Hudson County Water Co.*, 76 N.J. Eq. 543; *Cobb* v. *Lincoln Park,* 202 Ill. 427) and it would seem plain that the courts below were correct in refusing to issue a writ of mandamus. As the Supreme Court of the District of Columbia said in this case (R. 33):

> If this Court should grant the prayer of the petition and issue its writ of mandamus today, then tomorrow the proper authorities of the Government may successfully invoke our aid to prevent the construction of the wharf. The Court is therefore asked to do a futile thing, if not to compel a wrongful act.

An examination of the authorities shows, we believe, that the relators have no right or privilege to build a wharf in the Potomac River and that the Secretary of War was therefore justified in refusing to grant to them a permit even though he had concluded that the proposed wharf would not interfere with navigation.

A. The relators have no title to any land below high-water mark in the Potomac River and the original grant to their land carried with it no right to build a wharf

The relators allege in their petition in the Supreme Court of the District of Columbia that they

are the owners of land in the State of Virginia bounded on the north by the Potomac River (R. 2–4). They do not assert the ownership of any land in the District of Columbia. The petition and the evidence do not show the ultimate source of the relators' Virginia title, but it may be assumed to have been derived under mesne conveyances from the grant made on September 27, 1688, by King James II to Lord Culpepper. In *Morris* v. *United States,* 174 U.S. 196, 225, this Court held that the earlier grant to Lord Baltimore was not "affected by the subsequent grant to Lord Culpepper," and that as a consequence no part of the bed of the Potomac River was embraced in the grant to Lord Culpepper. In *Smoot Sand & Gravel Corp.* v. *Washington Airport,* 283 U.S. 348, this Court held that the boundary line between the District of Columbia and Virginia was at high-water mark on the south shore. This decision was based on a construction of the original grants and establishes the proposition that the relators' predecessors in ownership obtained no title to any land below high-water mark on the south shore of the Potomac River. The title to all land in the bed of the Potomac River to high-water mark on the Virginia shore is in the United States as the successor to Maryland under the original grant to Lord Baltimore. *Morris* v. *United States, supra,* at 230.

It follows from these decisions that the relators have no right to construct a wharf in the Potomac

River as owners of the land on which the wharf is to be built, for they own no land below high-water mark. Moreover, the grant from King James II to Lord Culpepper on September 27, 1688, upon which the relators' rights ultimately depend, carried with it no riparian rights of any sort in the Potomac River. Our contention on this point is established, it would seem, by this Court's decision in *Shively* v. *Bowlby,* 152 U.S. 1. In that case, after stating (p. 11) that—

> By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King,

this Court said (p. 13):

> It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. * * *
>
> By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation.

See also *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65.[4]

When the grant to Lord Culpepper was made in 1688, the Crown had already granted to Lord Baltimore the entire Potomac River to high-water mark on its south shore. It follows that Lord Culpepper's grant carried with it no right to build wharves into the Potomac River. And even if there had been no prior grant to Lord Baltimore, it seems plain from this Court's decision in *Shively* v. *Bowlby, supra,* that private owners of land along the Potomac River in what is now Virginia obtained no right valid against the Crown or its representatives to build wharves into the river. Such structures, as this Court has said, would have been purprestures subject to abatement or to seizure and use for the benefit of the King or his representative on this continent. These original grants made in the seventeenth century, and by the King, were plainly governed by this principle of common law.

The relators, therefore, cannot establish a right to build wharves into the river by tracing their title to Lord Culpepper. If such a right is appurtenant to their land in Virginia it must have been acquired at some time subsequent to 1688. We submit no such right has been acquired.

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[4] "The right which the appellee claims * * * is the right to wharf out to navigable water. At common law no such right attached to the owner of shore lands." *Western Pacific Ry. Co.* v. *Southern Pacific Co.*, 151 Fed. 376, 390 (C.C.A. 9th).

B. No right to erect wharves in the Potomac River has been acquired either by prescription or usage.

The relators make no contention that the right which they assert is based on prescription or other long-continued usage peculiar to their specific tract of land. They do not allege that there is a pier in front of their property or that there ever has been one. There is, therefore, no basis in this record for the assertion of any specific prescriptive right to do what the relators seek to do. If they have such a right, then, it must be based on long-continued usage general to the Virginia shore of the Potomac River, or on a grant.

It has already been pointed out that this Court has decided in *Shively* v. *Bowlby,* 152 U.S. 1, 13, that the owners of land along navigable tidewater do not acquire any right to build wharves unless such a right is expressly granted or acquired by long usage. That there has been such long usage in this case has neither been alleged nor proved; and an examination of the available historical material shows clearly that there was no such usage at the time of the creation of the District of Columbia.

From early times Maryland conferred the right of wharfage upon parties occupying uplands washed by navigable streams, but in every case the right was conferred by special acts of the legislature giving defined rights under definite limitations at particular localities. Some of these statutes are referred to and summarized in the opinion

of the Supreme Court of the District of Columbia in this case (R. 27–30), and it is not necessary to recount them here. They fail to show any general usage or privilege in Maryland to build wharves into the Potomac River, and by their express grants of such a privilege in particular cases they emphasize that Maryland retained to itself its power to control the use of land below high-water mark and that there was no general privilege to construct wharves in the absence of specific legislative authority. The first *general* grants to riparian proprietors in Maryland to make improvements in the waters in front of their land and to construct wharves was not made until 1835. Maryland Acts, 1835, c. 168. This grant was limited to owners in fee simple, but in 1862 it was extended generally. Maryland Acts, 1862, c. 129, Sec. 39. These grants obviously came too late to confer any authority upon the present relators, and the fact of their enactment shows that no such general right had been recognized by the Maryland law before.[5]

The relators state in their brief (p. 20) that "by the usage of over three hundred years in Maryland and Virginia, the riparian owner has been allowed to maintain a wharf into navigable water * * *."

[5] The Compact of 1785 (see pp. 29–39, *infra*) is further evidence that no such general right of wharfage existed, for its provisions on this subject would have been unnecessary if both States had recognized such a right when it was adopted.

There is no evidence whatever in the record to justify this statement, and there is no foundation for it in the scanty material collected in the relators' brief. The wharves referred to in the quotations on pp. 17–18 of the relators' brief may have been built pursuant to grant or express legislative authority. The authors cited have of course made no investigation of this question. Their statements therefore fall far short of showing that there ever was a general right of riparian owners on the Virginia shore of the Potomac River to build wharves against the objection of the owner of the land on which the wharves were built.

The only other authority cited with respect to Maryland is *Baltimore & Ohio Railroad Co.* v. *Chase,* 43 Md. 23, 34. This case was not decided until 1875, more than eighty years after the formation of the District of Columbia, and after the passage of the Maryland Acts of 1835 and 1862 referred to above. It obviously has no effect on the law of the District. Moreover, the statements in the opinion on which the relators rely are purely dicta, for the decision turns entirely on a Maryland statute of 1745 (Act of 1745, c. 9, Sec. 10) expressly granting to riparian proprietors in the City of Baltimore the right to build wharves.

The Maryland decisions with respect to the period before the creation of the District of Columbia plainly establish that no right in the riparian owner to build a wharf in navigable streams was

recognized in the absence of legislation specifically authorizing such a structure. These decisions clearly treat the beds of navigable rivers as the exclusive property of the State and not subject to encroachment by the building of wharves or otherwise except with the express permission of the State in the nature of a grant. In *Casey's Lessee* v. *Inloes,* 1 Gill 430, the plaintiffs claimed under a grant to "Mountenay's Neck," bounded by water. The defendants claimed under a grant to "Bold Venture" which was originally under water adjacent to the plaintiffs' grant. The court held that the proprietors of "Mountenay's Neck" had no riparian rights apart from the Act of 1745, and that the Act of 1745 was not applicable where the land below the water line was privately owned. The court said (p. 512):

> The grant of *"Bold Venture,"* though for the most part covered with water, still passes to the grantee all the soil, under the water, included within its outlines, with all the rights of property incident thereto, subject only to the rights of the public, as to fishing and navigation. If it had been encroached on by any person, as by driving of piles and erecting a wharf, or building a house thereon, an action of trespass or ejectment could have been maintained by the patentee, or those claiming under him.

Other Maryland decisions lead to the same conclusion—that riparian proprietors did not have

the right to build a wharf in the absence of specific authorization by statute, and that such statutes were treated as franchises merely, granting no final property rights until they were acted on. *Harrison* v. *Sterett*, 4 Harris & McH. 540 (decided in 1774—the right to wharfage in Baltimore was made to turn entirely on the construction of the Act of 1745); *Browne* v. *Kennedy*, 5 Harris & J. 195; *Giraud's Lessee* v. *Hughes*, 1 Gill & Johns. 249; *Wilson's Lessee* v. *Inloes*, 11 Gill & Johns. 351; *Hammond's Lessee* v. *Inloes*, 4 Md. 138; *Horner* v. *Pleasants*, 66 Md. 475, 477 ("This is a purely statutory grant, * * *"). The questions involved in these decisions related to the period just before 1791, when the District of Columbia was created, and show plainly that no general riparian right to build wharves into the Potomac River was recognized by the law of Maryland prior to that time.[6] After 1791 the question was one of the law

[6] In *Morris* v. *United States*, 174 U.S. 196, 237–240, this Court considered *Browne* v. *Kennedy*, *supra*, and *Wilson's Lessee* v. *Inloes*, *supra*, and said that they gave the statutes of Maryland "a construction at variance with that which prevailed at the time of the cession." But this Court was considering the cases only with respect to the question whether the early Maryland statutes authorized the granting of land which lay under navigable waters. The cases were not referred to as bearing on the question of the right to build wharves, and so far as that question is concerned it is plain that they do not represent any change in the Maryland law. That law is, and always has been, that the right of wharfage exists only when it has been specifically granted by the legislature.

of the District of Columbia. The relators point to no decision, statute, or usage in the District of Columbia which indicates in any way that the law has been changed.

It is, of course, obvious that the relators' position cannot be aided by any legislation or usage of the Commonwealth of Virginia. The sovereignty of Virginia, where it borders on the District of Columbia, extends only to high-water mark on the south shore of the Potomac River. This line from the beginning has marked the point beyond which its legislative and political power could not extend. Up to the time of the creation of the District of Columbia, Maryland owned and held the entire bed of the river. At no time has Virginia had any power to legislate with reference to the soil below that mark. The legislation or custom or common law of Virginia obviously could not affect land which Virginia had never owned and over which it had never had any jurisdiction. For this reason, among others, the relators' reference to *Norfolk City* v. *Cooke*, 27 Grat. 430, does not aid them.

It follows, therefore, that the relators have no rights based upon general usage or prescription and that if they have the rights which they claim, they must be based upon the Compact of 1785.

C. The relators' contention that they are entitled to build a wharf in the Potomac River is not supported by the Compact entered into in 1785 by Maryland and Virginia

The relators place their chief reliance upon the Compact of 1785 between the States of Maryland and Virginia.[7] The relators contend that—

> the right to build a wharf into the Potomac from the Virginia shore was expressly recognized and legalized as a property right by the Compact of 1785 between Virginia and Maryland, and has been maintained unimpaired by subsequent legislation down to the present time. (Br. 20.)

Article 6 of this Compact provided that the River Potomac should be considered a common highway of navigation and commerce to the citizens of Virginia and Maryland and of the United States. Article 7 provides that—

> The citizens of each state, respectively, shall have full property in the shores of Patowmack river adjoining their lands with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; * * *.

It is contended that this Compact became the law of Maryland by the ratification Act of 1786 (2

[7] The text of the Compact may be found in 1 Dorsey, Md. Laws, 1692–1839, p. 187, and 12 Hening, Va. Statutes, p. 50. For convenience, it is set out in the Appendix, *infra*, pp. 46–52.

Kilty, Md. Laws, c. 1), and of Virginia by the similar Act of 1785 (12 Hening, Va. Statutes, p. 50), and that it became the law of the District of Columbia by the Organic Act of 1801, c. 15, 2 Stat. 103.

The Compact of 1785 has had the consideration of this Court in several cases. It has been definitely decided that it has no bearing upon the determination of the boundary line between the District of Columbia and Virginia. *Morris* v. *United States*, 174 U.S. 196, *supra; Marine Railway Co.* v. *United States*, 257 U.S. 47; *Smoot Sand & Gravel Corporation* v. *Washington Airport*, 283 U.S. 348. In the *Morris case* this Court said the Compact was entered into for the purpose of enforcing criminal laws and regulating navigation in the Potomac River (174 U.S. at 224); in the *Marine Railway case* that it was a regulation of commerce (257 U.S. at 64).

But this Court has decided specifically that the Compact of 1785, and the laws of Maryland and of Virginia and of the United States which followed it, granted no private rights beyond the control of the contracting States, and thus beyond the control of the United States as successor of Maryland as owner of the land in the bed of the Potomac River. In *Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91, this Court said (p. 96):

> The compact made in the year 1785, between Virginia and Maryland, was made by the two states, in their character as states.

> The citizens, individually, of both commonwealths, were subject to all the obligations imposed, and entitled to all the benefits conferred by that compact. But the citizens, as such, individually, were in no just sense the parties to it; those parties were the two states, of which they were citizens. The same power which established it, was competent either to annul or modify it. Virginia and Maryland, then, if they had retained the portions of territory respectively belonging to them on the right and left banks of the Potomac, could have so far modified this compact as to have agreed to change any or all of its stipulations. They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever. When they ceded to congress the portion of their territory, embracing the Potomac river, within their limits, whatsoever the legislatures of Virginia and Maryland could have done by their joint will, after that cession, could be done by congress, subject only to the limitations imposed by the acts of cession. * * *

Again, in *Potomac Steamboat Company* v. *Upper Potomac Steamboat Company*, 109 U.S. 672, 675, this Court said:

> The nature and extent of this compact were considered by this court in *Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91, where it was declared to be a compact between the

> States, as such, to which the citizens of neither were parties, and, being subject to the will of the States, as to any changes in its stipulations, it was equally under the control of Congress, after the cession.

These cases seem to establish beyond question that even if the Compact of 1785 is still in force with respect to the District of Columbia, it affords to the relators individually no basis for the assertion of their rights as against the United States. It was at most a commercial and political arrangement between sovereigns and the right of individuals under it were not in the nature of grants but remained at all times subject to the control of the contracting parties. The Compact therefore affords the relators no basis for the assertion of any rights in the Potomac River against the United States.

Moreover, the Compact necessarily came to an end so far as the District of Columbia was concerned, when the titles of the two contracting parties were united in one. It is a familiar doctrine of common law that immediately upon the uniting of dominant and servient estates in the same owner, the servitude is extinguished. Washburn, Easements and Servitudes (4th ed.) 683–685; *Atwater* v. *Bodfish*, 11 Gray (Mass.) 150; *Coleman's Appeal*, 62 Pa. 252, 274; *Wilder* v. *Wheeldon*, 56 Vt. 344. It follows that: "The compact of 1785 never was in force in the District of Columbia." *Evans* v. *United States*, 31 App.D.C. 544, 550. To the same

effect is *Herald* v. *United States,* 284 Fed. 927 (App.D.C.).

Nor can it be said that the retrocession of part of the District of Columbia to Virginia in 1846 operated to revive the Compact of 1785 or to reestablish the privileges granted by the Compact. Whatever privileges Virginia possessed under the Compact were destroyed by the joint cession to the United States. The Act of retrocession (Act of July 9, 1846, c. 35, 9 Stat. 35) made no mention of the rights which had been granted by the Compact,[8] and the merged privileges were in no way revived. It is well recognized as a principle of common law that when servitudes are extinguished through the uniting of the dominant and servient estates in the same owner, the servitude does not again arise upon severance of the estates unless it be reimposed by express words. *Morgan* v. *Meuth,* 60 Mich. 238; *Fetters* v. *Humphreys,* 19 N.J. Eq. 471; *Plimpton* v. *Converse,* 42 Vt. 712. *In Evans* v. *United States,* 31 App.D.C., 544 *supra,* the court said (p. 552):

> The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States,

[8] The terms of this statute, so far as they relate to the retrocession of the territory, were that "* * * all of that portion of the District of Columbia ceded to the United States by the State of Virginia, and all the rights and jurisdiction therewith ceded over the same be, and the same are hereby, ceded, and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon."

> and, having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession.

The courts of the District of Columbia have uniformly held that the Compact of 1785 was never in force in the District of Columbia. *Evans* v. *United States,* 31 App.D.C. 544; *Marine Railway Co.* v. *United States,* 49 App.D.C. 285, affirmed, 257 U.S. 47; *Herald* v. *United States,* 284 Fed. 927 (App. D.C.).[9] The defendant in the *Evans case* had been arrested and charged with the violation of an Act of Congress prohibiting fishing by means of dip nets and certain other contrivances in the waters of the Potomac River. It was his defense that Article 7 of the Compact, which *inter alia* declared the right of fishing to be common to the citizens of both States, was warrant for his action. But the court held that the privileges contained in Article 7 were destroyed by the cession of Maryland and Virginia to the United States, and that consequently when the United States became the exclusive owner of the Potomac River and its beds and shores, Congress in the exercise of its police power had authority to regulate fishing in the Potomac River within the District of Columbia. The holding was based upon what this Court had said rela-

[9] The Court of Appeals in the instant case said (R. 64): "It has been decided so frequently by the courts that it is not in force in the District of Columbia as to almost render the question moot."

tive to the Compact in *Georgetown* v. *Alexandria Canal Co., supra.* It was asserted by the defendants in the *Evans* and *Herald cases* that the privilege of fishing under the Compact was a vested right. The court concluded that none of the rights or privileges set out in Article 7 pertained to interests in the soil but were limited to "privileges granted by the compact, so long as the States, the parties, continue the agreement in force." 31 App.D.C. at 549.

We submit that this holding is a necessary conclusion from *Georgetown* v. *Alexandria Canal Co.,* where this Court held that the United States after the cession could have changed or modified all of the provisions of the Compact. The mutual arrangements between the two States came to an end when the parties to the Compact were superseded by the United States.

Ever since the organization of the District of Columbia, Congress has asserted title to the high-water mark on the Virginia shore within the District and has exercised jurisdiction thereover without dispute. This Court in the *Marine Railway case* (257 U.S. at 65–66) called attention to the fact that Section 1 of the Revised Statutes relating to the District of Columbia describes the District of Columbia as "including the river Potomac in its course through the District," and then observed that this "imports an assertion by Congress that the *title* of the United States embraces the whole river bed; and the jurisdiction of the District

over the river seems to have been exercised without dispute." (Italics ours.) As one instance of the exercise of such exclusive dominion we call attention to the Act of Congress making it unlawful for any person to fish with nets in the Potomac River (Act of March 3, 1901, c. 854, sec. 896, 31 Stat. 1189, 1335). Congress did not consult Virginia when this legislation was enacted and there was, of course, no necessity for the concurrence of Maryland. The concluding sentence of Article 7 of the Compact of 1785 prohibited citizens of Virginia from fishing with nets or seines on the shores of Maryland, but otherwise recognized the right to fish as common to all citizens of the two States. Congress undertook to enact legislation relating to this right notwithstanding the provisions of Article 7 of the Compact, and without any reference to the Compact. The same is true of the Act of Congress granting to the Alexandria Canal Company rights to put structures and otherwise deal with the shores of the Potomac River at the water front of Georgetown which was considered by this Court in *Georgetown* v. *Alexandria Canal Co., supra.* Another such statute is the Act of February 3, 1913, c. 25, 37 Stat. 656 (D.C. Code, Title 6, Sec. 305), which forbids the erection of a wharf in the District of Columbia without a permit from the District Commissioners.

Both the petitioners and the dissenting members of the court below (R. 79) put strong reliance upon a sentence appearing in this Court's opinion in the

Marine Railway case, in support of the contention that the Compact is still in force. The language relied on is (257 U.S. at 63):

> The original state of things was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side.

But it is plain that this language related solely to the question of boundary. The Court held that the boundary between the District of Columbia and Virginia was not affected by the grant from Virginia and the regrant to that Commonwealth. It is obvious that the Court did not intend this language to apply to private rights claimed under the Compact. That the Court did not mean to hold that the Compact was still in force is clear from what was said at the end of the paragraph following the statement quoted above. Speaking of the Compact, it was said (p. 64):

> It may be laid on one side even if it ever was in force in the District of Columbia, which has been denied on the ground that the compact was abrogated so far as it affected this land by the grant of the United States. *Evans* v. *United States,* 31 App. D.C. 544, 550. See *Georgetown* v. *Alexandria Canal Co.,* 12 Pet. 91.

Furthermore, this Court has often given effect to the rule that the existence and nature of riparian rights is a question of local law and governed by local statutes and decisions. *Shively* v. *Bowlby,* 152 U.S. 1; *Philadelphia Co.* v. *Stimson,* 223 U.S.

605, 632; *Arkansas* v. *Tennessee,* 246 U.S. 158, 176. The decision of this Court in *Georgetown* v. *Alexandria Canal Co.,* 12 Peters 91, together with the three decisions of the Court of Appeals of the District of Columbia already referred to (*Evans* v. *United States,* 31 App.D.C. 544; *Marine Railway Co.* v. *United States,* 49 App.D.C. 285, affirmed, 257 U.S. 47; *Herald* v. *United States,* 284 Fed. 927 (App.D.C.)) would seem to establish a local rule of property in this District to the effect that the Compact is not in force in the District and that therefore it affords no basis for any claim of rights appurtenant to lands in Virginia on the south shore of the Potomac River. Cf. *Massachusetts* v. *New York,* 271 U.S. 65, 89.

The United States owns the lands in the bed of the Potomac River, and, subject to the qualifications, perhaps, that the land must be devoted to a public use, and that a navigable channel must be left in the Potomac, the United States may do with the land as it sees fit. *Morris* v. *United States,* 174 U.S. 196, *supra,* involved the title to over 750 acres of land made by filling in the bed of the Potomac River in the south part of the present City of Washington, and *Marine Railway* v. *United States,* 257 U.S. 49, involving land made by filling in the bed of the Potomac River adjacent to the Virginia shore. In each case it was held that the United States was entitled to the made land.

Even if the Compact of 1785 remained in force after the retrocession to Virginia, it does not sup-

port the relators' claims. Given its greatest effect, the Compact cannot stand higher than a statutory right of wharfage accorded to a riparian proprietor on a navigable stream, and such a statutory right this Court in *Shively* v. *Bowlby*, 152 U.S. 1, 56, declared to be "a mere license revocable at the pleasure of the legislature until acted upon." The Maryland court has decided that this is the effect to be given to the statutes of that State allowing the construction of wharves. (*Giraud's Lessee* v. *Hughes*, 1 Gill & Johns. 251; *Casey's Lessee* v. *Inloes*, 1 Gill 430, 498; Cf. *Baltimore* v. *McKimm*, 3 Bland Ch. 453, 466; *Linthicum* v. *Coan*, 64 Md. 439, 453; *Classen* v. *Chesapeake Guano Co.*, 81 Md. 258, 267), and certainly no greater effect can be given to the Compact. In the present case, the relators have not exercised the right to wharf out if they ever had any right, nor had they done so prior to the passage of the Crampton Act (Act of May 29, 1930, c. 354, 46 Stat. 483) which provides for the taking over of a portion of the bed of the Potomac River and contiguous land for the construction of the George Washington Memorial Parkway. The "shores of the Potomac" are specifically referred to in the Act. Under the authority thus granted by this Act the National Capital Park and Planning Commission has taken possession of the land on which the relators seek to build their wharf (R. 51–53). The Crampton Act was adopted in furtherance of the general policy of Congress, announced in the Act

of June 6, 1924, c. 270, 43 Stat. 463. It thus appears that Congress has taken away the right of wharfage if it ever existed.

D. The decisions of this Court in Shively v. Bowlby, 152 U.S. 1, and Marine Railway Co. v. United States, 257 U.S. 47, establish the absence of the rights which the relators claim

There are two decisions of this Court which seem of especial importance in considering the present controversy. They show beyond question, we believe, that the relators have no right against the United States to build a wharf into the Potomac River. These two cases are *Shively* v. *Bowlby*, 152 U.S. 1, and *Marine Railway Co.* v. *United States*, 257 U.S. 47.

In *Shively* v. *Bowlby, supra*, it appeared that the Legislature of Oregon in 1862 had by statute authorized the owners of land lying upon a navigable stream to build wharves into the stream beyond the line of low-water mark. Shively owned land on the Columbia River which he had obtained by grant from the United States, and under the statute he consequently had authority to construct a wharf in front of his land. While this statute was still in force, the Legislature in 1872 passed another act providing for the sale of submerged lands under navigable waters to private parties under certain limitations and restrictions. Bowlby claimed title to land below high-water mark on the Columbia River, adjacent to Shively's land, and Bowlby had erected a wharf upon the shore of the

river below high-water mark and extending several hundred feet into the river. Shively contended that he was entitled to the land below high-water mark and that the occupation of the land by Bowlby deprived him of his right of wharfage.

In deciding the controversy, this Court made an extensive review of the many decisions relating to riparian rights. It held that Shively's grant from the United States was bounded by high-water mark since it had always been the policy of the United States, in the absence of controlling considerations to the contrary, to reserve the lands below high-water mark to the States. It was held, therefore, that Shively's grant from the United States gave him no title to the lands below high-water mark, and that he had no right of wharfage or other interest with respect to the land below high-water mark unless that right had been given him by Oregon. That right had been conferred by the Oregon statute of 1862, but this Court, after quoting the opinion of the Supreme Court of Oregon regarding the effect of this statute, accepted the conclusion of that court that (p. 56)—

> The authority conferred by the statutes of Oregon upon upland owners on navigable rivers to construct wharves in front of their land did not vest any right until exercised, but was a mere license revocable at the pleasure of the legislature until acted upon; and that the State had the right to dispose of its tide lands free from any easement of the upland owner.

It was accordingly held that Shively had no wharfage rights and this bill by which he sought to assert rights in the land below high-water mark was dismissed.

The application of the decision in *Shively* v. *Bowlby* to the present controversy seems inescapable. The relators' land is bounded by high-water mark on the Potomac shore, and the grant to their predecessor in title, like the grant to Shively, carried with it no rights to construct wharves in the river. The relators rely upon the Compact of 1785 and the legislation carrying it into effect, just as Shively relied upon the Oregon statute of 1862. But that statute granted Shively no rights which were beyond recall by the State, and for similar reasons it should be held here, we believe, that the Compact of 1785, even if it is still in force, cannot prevail against subsequent legislation of the United States as evidenced the Act of February 3, 1913, c. 25, 37 Stat. 656 (D.C. Code, Title 6, Sec. 305), and by the Crampton Act, and the action of the National Park and Planning Commission in pursuance of the latter statute.

Moreover, one of the bases of the decision in *Shively* v. *Bowlby* was that it was not the policy of Congress in dealing with the public lands of the United States to grant any rights in the land under navigable rivers. If that was the policy with respect to the land involved in *Shively* v. *Bowlby*, it would seem to have been equally the policy with respect to the public land involved in this case. The

same policy was referred to and made a basis of the decision in *Morris* v. *United States*, 174 U.S. 196, *supra*.

The other decision of this Court which seems to us to be a conclusive bar to the relators' position is *Marine Railway Co.* v. *United States*, 257 U.S. 47, *supra*.[10] There the United States brought a suit in the Supreme Court of the District of Columbia to recover the possession of land which had been made by filling in below low-water mark on the *south* shore of the Potomac River adjacent to Virginia. It is not true, as the dissenting members of the court below seem to have thought (R. 77), that this case involved simply a question of boundary. The United States sought and obtained a judgment that it was entitled to the possession of the land. The Court held not only that the made land was in the District of Columbia and therefore within the jurisdiction of the Supreme Court of the District of Columbia, but also that the United States was entitled to recover the possession of the land. This Court said (p. 66):

> It may happen that such filling as is done in this case will interrupt previously existing access to the water front. But that does not affect the right of the United States to possession of the land. What other rights, if

[10] The brief for the United States in the *Marine Railway case*, No. 45, Oct. Term, 1921, pp. 132–157, contains an elaborate discussion of many of the questions raised in the present case.

any, the plaintiff in error may have does not concern us now.

If the United States could fill in the land in Battery Cove involved in the *Marine Railway case* and be entitled to the exclusive possession of the land so made, it seems to follow that the United States could fill in the land in front of the relators' property and be entitled to the possession of that land. If the United States can fill in the land, it must follow that the relators had no right to build a wharf on the land against the objection of the United States.

As has been pointed out, *Marine Railway Co.* v. *United States* did not involve simply a question of boundary or jurisdiction. It involved and decided a substantive question which seems to us a necessary bar to the contentions of the relators here.

CONCLUSION

The judgment below is correct and should be affirmed.

Respectfully submitted.

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APPENDIX

Section 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151 (U.S.C., Title 33, Sec. 403), known as the River and Harbors Appropriation Act of 1899, provides as follows:

> SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

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THE COMPACT OF 1785

The compact entered into in 1785 between Maryland and Virginia [11] was as follows:

> *First.* The commonwealth of Virginia disclaims all right to impose any toll, duty, or charge, prohibition or restraint, on any vessel whatever sailing through the capes of Chesapeake bay to the state of Maryland, or from the said state through the said capes outward bound; and agrees that the waters of Chesapeake bay, and the river Pocomoke, within the limits of Virginia, be forever considered as a common highway, free for the use and navigation of any vessel belonging to the said state of Maryland, or any of its citizens, or carrying on any commerce to or from the said state, or with any of its citizens; and that every such vessel inward or outward bound, may freely enter any of the rivers within the commonwealth of Virginia as a harbour, or for safety against an enemy, without the payment of port duties, or any other charge; and also, that the before-mentioned parts of Chesapeake bay, and Pocomoke river, be free for the navigation of vessels from one part of the state of Maryland to another.
>
> *Second.* The state of Maryland agrees that any vessel belonging to the commonwealth of Virginia, or any of its citizens, or carrying on commerce to or from the said commonwealth, or with any of its citizens, may freely enter any of the rivers of the said state of Maryland as a harbour, or for safety against an enemy, without the payment of any port duty or other charge.

[11] The text of the compact is given in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50.

Third. Vessels of war, the property of either state, shall not be subject to the payment of any port duty or other charge.

Fourth. Vessels not exceeding forty feet keel, nor fifty tons burthen, the property of any citizen of Virginia or Maryland, or of citizens of both states, trading from one state to the other only, and having on board only the produce of the said states, may enter and trade in any part of either state, with a permit from the naval-officer of the district from which such vessel departs with her cargo, and shall be subject to no port charges.

Fifth. All merchant vessels (except such as are described in the fourth article) navigating the river Potowmack, shall enter and clear at some naval office on the said river, in one or both states, according to the laws of the state in which the entry shall be made. And where any vessel shall make an entry in both states, such vessel shall be subject to tonnage in each state only in proportion to the commodities carried to, or taken from, such state.

Sixth. The river Potowmack shall be considered as a common highway, for the purpose of navigation and commerce to the citizens of Virginia, and Maryland, and of the United States, and to all other persons in amity with the said states, trading to or from Virginia or Maryland.

Seventh. The citizens of each state respectively shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the

right of fishing in the river shall be common to, and equally enjoyed by the citizens of both states: *Provided*, That such common right be not exercised by the citizens of the one state, to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other.

Eighth. All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.

Ninth. Lighthouses, beacons, buoys, or other necessary signals, shall be erected, fixed, and maintained upon Chesapeake bay, between the sea and the mouths of the rivers Potowmack and Pocomoke, and upon the river Potowmack, at the expense of both states. If upon Potowmack river, at the joint and equal charge of both states; and if upon the before-mentioned part of Chesapeake bay, Virginia shall defray five parts, and Maryland three parts of such expence; and if this proportion shall in future times be found unequal, the same shall be corrected. And for ascertaining the proper places, mode, and plans for erecting and fixing lighthouses, buoys, beacons and other signals, as aforesaid, both states shall upon the application of either to the other, appoint an equal number of commissioners, not less than three nor more than five from each

state, to meet at such times and places as the said commissioners or a major part of them, shall judge fit, to fix upon the proper places, mode, and plans for erecting and fixing such lighthouses, beacons, or other signals, and report the same, with an estimate of the expence, to the legislatures of both states, for their approbation.

Tenth. All piracies, crimes, or offences committed on that part of Chesapeake bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack river (now called Smith's Point) to Watkins's Point, near the mouth of Pocomoke river, may be doubtful; and on that part of Pocomoke river, within the limits of Virginia, or where the line of division between the two states upon the said river, is doubtful, by any persons not citizens of the commonwealth of Virginia, against the citizens of Maryland, shall be tried in the court of the state of Maryland which hath legal cognizance of such offence. And all piracies crimes, and offences committed on the before mentioned parts of Chesapeake bay and Pocomoke river, by any persons not citizens of Maryland, against any citizen of Virginia, shall be tried in the court of the commonwealth of Virginia which hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke river, by persons not citizens of either state, against persons not citizens of either state, shall be tried in the court of the commonwealth of Virginia having legal cognizance of such offences: And all piracies, crimes, and offences committed on the said parts of Chesapeake bay and Pocomoke River, by any

citizen of the commonwealth of Virginia, or of the state of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen. The jurisdiction of each state over the river Potowmack shall be exercised in the same manner as is prescribed for the before-mentioned parts of Chesapeake bay and Pocomoke river, in every respect, except in the case of piracies, crimes, and offences committed by persons not citizens of either state, upon persons not citizens of either state, in which case the offenders shall be tried by the court of the state to which they shall first be brought. And if the inhabitants of either state shall commit any violence, injury, or trespass, to or upon the property or lands of the other, adjacent to the said bay or rivers, or to any person upon such lands, upon proof of due notice to the offender to appear and answer, any court of record, or civil magistrate of the state where the offence shall have been committed, having jurisdiction thereof, may enter the appearance of such person, and proceed to trial and judgment, in the same manner, as if legal process had been served on such offender; and such judgment shall be valid and effectual against the person and property of such offender, both in the state where the offence shall have been committed, and also in the state where the said offender may reside, and execution may be issued by the court, or magistrate, giving such judgment, in the same manner as upon judgments given in other cases; or upon a transcript of such judgment, properly authenticated, being produced to any court; or magistrate, of the state where such offender may reside, having jurisdiction within the state, or county where the offender may

reside, in cases of a similar nature, such court, or magistrate, shall order execution to issue upon such authenticated judgment in the same manner, and to the same extent, as if the judgment had been given by the court, or magistrate, to which such transcript shall be exhibited.

Eleventh. Any vessel entering into any port on the river Potowmack, may be libelled, or attached for debt, by process from the state in which such vessel entered. And if the commercial regulations of either state shall be violated by any person carrying on commerce in Potowmack or Pocomoke rivers, the vessel owned or commanded by the person so offending, and the property on board, may be seized, by process from the state whose laws are offended, in order for trial. And if any person shall fly from justice, in a civil or criminal case, or shall attempt to defraud creditors by removing his property, such person, or any property so removed, may be taken on any part of Chesapeake bay, or the rivers aforesaid, by process of the state from which such person shall fly, or property be removed; and process from the state of Virginia may be served on any part of the said rivers, upon any person, or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury having been by him committed; and process from the state of Maryland may be served on any part of the said rivers, upon any person, or property of any person, not a citizen of Virginia, indebted to a citizen of Maryland, or charged with injury by him committed. And in all cases of trial in pursuance of the jurisdiction settled by this compact, citizens of either state shall attend as witnesses in the

other, upon a summons from any court, or magistrate, having jurisdiction, being served by a proper officer of the county where such citizen shall reside.

Twelfth. The citizens of either state having lands in the other, shall have full liberty to transport to their own state, the produce of such lands, or to remove their effects, free from any duty, tax, or charge whatsoever, for the liberty to remove such produce or effects.

Thirteenth. These articles shall be laid before the legislatures of Virginia and Maryland, and their approbation being obtained, shall be confirmed and ratified by a law of each state, never to be repealed, or altered, by either, without the consent of the other.

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